No. 16238

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY FRISONE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

PAGE

Jurisdictional statement 1

Statement of the case 2

Statement of points on appeal 3

Statement of facts 3

Argument 8

A. The substance of the proffered testimony was shown to the court and no prejudice accrued to appellant by reason of his being precluded from going into details 8

B. The rulings on the proposed evidence were proper 10

C. The court's remarks relative to failure of recollection as a defense to perjury were not misunderstood and were harmless 14

Conclusion 24

Appendices:

Appendix A. Hearing on motion for new trial .... App. p. 1

Appendix B. The indictment .... App. p. 3

TABLE OF AUTHORITIES CITED

Cases | PAGE

Barshop v. United States, 192 F. 2d 699 14
Butler v. McKey, 138 Fed. 373 21
Commonwealth v. Dale, 107 Atl. 743 10
Crawford v. United States, 212 U. S. 183 24
D'Aquino v. United States, 192 F. 2d 338 9
DeCamp v. United States, 10 F. 2d 984 14
Finn v. United States, 219 F. 2d 894 14
Furlong v. United States, 10 F. 2d 492 14
George v. State, 200 So. 602 11
Huntington v. United States, 175 Fed. 950 13
Leoptrot v. State, 51 Fla. 57, 40 So. 616 .... 11, 13
McConnell v. United States, 81 F. 2d 639 13
McDuffie v. United States, 227 Fed. 961 13
O'Connell v. Beecher, 21 App. Div. 298, 47 N. Y. Supp. 334 10
People v. Doody, 172 N. R. 165, 64 N. E. 807 12
People v. Francis, 319 P. 2d 103 9
People v. Senegram, 149 Pac. 786 21
People v. Van Tiedman, 52 Pac. 155 21
Piquett v. United States, 81 F. 2d 75, cert. den. 298 U. S. 664 11
Shreve v. United States, 103 F. 2d 796 9
Spivey v. Atteberry, 238 P. 2d 814 12
State v. Coyne, 214 Mo. 344, 114 S. W. 8 11
State v. Riggle, 298 P. 2d 349 11
Strada v. United States, 281 Fed. 143 14
United States v. McCreary, 105 F. 2d 297 13

Rules

PAGE

Federal Rules of Criminal Procedure, Rule 52(a) 14

Statutes

Penal Code, Sec. 125 21

United States Code, Title 18, Sec. 1621 1

United States Code, Title 18, Sec. 3231 1

United States Code, Title 28, Sec. 1291 1

United States Code, Title 28, Sec. 1294 1

Textbooks

20 California Jurisprudence, Sec. 7, p. 1012 21

2 Wigmore on Evidence (3rd Ed.), Sec. 568, p. 660 12

7 Wigmore on Evidence (3rd Ed.), Sec. 1974, p. 113 13

7 Wigmore on Evidence (3rd Ed.), Sec. 1975, p. 118 12

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Anthony Frisone,

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APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged appellant guilty on Count Five of an Indictment returned in said District, which count charged the appellant with committing perjury in violation of the provisions of Title 18, Section 1621, United States Code. [R. 3-20, 78-80.]

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain an appeal and review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

In March 1957 the appellant was brought to trial on a charge of transporting a woman in interstate commerce for immoral purposes. [Rep. Tr. pp. 18-21; Ex. 1.]* He took the stand and testified in his own behalf. Nora Mathis Frisone, his wife, also testified in this trial. [Exs. 6A and 6B; Rep. Tr. pp. 215-228.]

The charge in the instant case is the alleged false testimony given in said Mann Act case. The Indictment here is in six counts. [R. 4-20.] Counts One and Two pertain to testimony of Nora Mathis Frisone. Counts Three through Six pertain to testimony of the appellant. The trial court dismissed Count Six at the close of the government's case. [R. 23-26.] The jury returned a verdict acquitting co-defendant Nora Mathis Frisone on Count Two, convicting the appellant on Count Five and disagreed on all other Counts [R. 32-33] as to both defendants below. A mistrial was declared as to the unresolved Counts and the government subsequently dismissed them. [R. 71-72.]

After the verdict convicting appellant on Count Five, he moved for a new trial [R. 70-71] which was denied. [R. 71.] The appellant was sentenced to eighteen months in the custody of the Attorney General of the United States and the appellant brought this appeal. [R. 78-80.]

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*Reference to the unprinted portions of the reporter's transcript are so designated herein; the printed record is denoted simply "R" followed by the page.

Statement of Points on Appeal.

Appellant's sole point, as finally briefed on this appeal, is that the trial court committed prejudicial error in ruling upon the admissibility of certain evidence at the trial of this cause.

Only a single instance of the trial court's so acting is sought to be reviewed as error. Appellee herein discusses various aspects of the trial court's ruling as separate points in its argument.

Statement of Facts.

At the trial wherein the questioned testimony was given the appellant was charged with transporting Nora Mathis Frisone [therein referred to as "Paula Frisone," see Ex. 1] to Mexico for purposes of prostitution. *The offense was alleged to have occurred on or about December 27, 1954.* [Ex. 1.]

Appellant and Nora Mathis Frisone testified in said trial, and the defenses there made were several, among which was the contention, testified to by both, that they were just acquainted with each other at the time alleged for said offense, that their relationship at that time was "casual" and *that a more intimate relationship did not develop until January of 1955* [Rep. Tr. pp. 216-217, 224-226]. The appellant testified that they did not go out together or date each other *until after the first of the year 1955.* [Rep. Tr. pp. 224-225.] It is to be noted that by stipulation and these record references the quoted testimony of this indictment is that given on the first trial. [Rep. Tr. pp. 214-215.]

The alleged false statements of the appellant in this last regard are set forth in Count Five of the Indictment [R. 16-17] reproduced in pertinent part in the Appendix.

At the trial of the within cause Inga Constance Smith testified that she lived with her husband at 7538 Lexington Avenue, Hollywood; that they have adjoining premises for rent at 7540 Lexington Avenue; and *that the Frisones jointly occupied these premises as man and wife during the period of September 1954 to January 1955* and that the light and gas for the rented premises were separately metered. [R. 83-86.]

Benjamin Smith testified to like effect in respect to the Frisones living together at these premises from September 1954 through the holidays. [R. 91-92.]

Southern California Edison Company records for electricity were produced for 7540 Lexington Avenue, Hollywood, and they showed that a request for power was made by Mrs. Frisone on September 7, 1954, that the "On Order" bears the name of Anthony Frisone and that service was so rendered through to January 1955. [R. 93-96; Ex. 4, received in evidence Rep. Tr. p. 174.]

Southern California Gas Company records for 7540 Lexington Avenue show service rendered from September 1954 to January 1955 and are in the name "N. Frisone." [R. 97-99; Ex. 5, received in evidence Rep. Tr. p. 174.]

Nora Mathis Frisone was called to the stand before the appellant was and testified in this cause that *before* the earlier trial the question was raised as to when she and ap-

pellant began their intimate relationship [R. 119] and that she discussed this with appellant and they were unable to come to an agreement as to the date, but that her husband believed it to be before the incident in Mexico. [R. 120-121.]

She further testified that an investigator had been sent to the Smith's to determine when they had lived on Lexington Avenue [R. 119, 130-131; see also: R. 132-134], and they were told that the Smiths' had no records and could not recall the date. [R. 130-131.]

It is to be noted that the trial court permitted extensive testimony as to the state of this witness's recollection as to the period of the earlier trial [R. 116-117, 118, 121, 123], all in relation to a substantially identical count to the one on which appellant was convicted.

The appellant was called to the stand several different times in his own defense. [R. 135, 168, 170.] On the first of these occasions he was read the testimony quoted in Count Five and he stated he believed it to be true at the time he gave it, but now knew it to be false *because of the light and gas records*. [R. 142-143.]

The appellant was then asked a long series of questions as to why he had so testified. [R. 143-148, 154-155, 160.]

The entire substance of his testimony in respect to this subject was to the effect that *he was aware before the first trial* that he had no recollection of when he had commenced living with his wife, Nora Frisone. [R. 143 *et seq.*]

He testified that at the time of the first trial he was trying to establish the date when he started living with

his wife [R. 143]; that he discussed this subject with a number of other people [R. 143-144, 146-147]; that he was misled by papers served on him by the prosecutor [R. 146, 147]; that he hired an investigator to check with the Smiths' and in considering her report believed the winter of 1954-1955 to be the time he lived on Lexington Avenue [R. 146, 154-155], but that from his own recollection he could not remember when he had first lived with his wife. [R. 155.]

It is to be noted that no such qualifications were included in his testimony at the first trial [Rep. Tr. pp. 224-225, which is the language quoted in Count V, reproduced in the Appendix.]

The above testimony of the appellant was concluded on May 29, 1958. On June 3, 1958, several other witnesses for the defense having been called in the one intervening day of trial [Rep. Tr. pp. 393, 395 and 421], the appellant was recalled to the stand and the following transpired. [R. 168-169]:

"Direct Examination

"Q. (By Mr. Cantillon): Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past.

Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant, if the court please, and without more foundation—

The Court: I cannot see any bearing upon the issue here.

Mr. Cantillon: Well, I'm going to offer to prove, your Honor, that—

Mr. Jensen: If the court please—

Mr. Cantillon: —he was treated in the Marine Corps.

The Court: No. We dont' want to have any offer of proof. There is no plea of insanity here.

Mr. Cantillon: No, it's not based upon that. It's based upon the subject of an honest belief. Recollection; failure of recollection—

The Court: Well, I don't think failure of recollection is a defense on a plea of not guilty in the Federal courts.

Mr. Cantillon: The proposition of his—well, I think I have stated my point. [421]

The Court: All right.

Mr. Cantillon: I have nothing further.

The Court: All right. Step down. [422]."

The foregoing statement of facts have been made rather extensive to put this matter in proper sequence and context and to avoid any misconception which may be created by the brief of appellant at pages 5, 6 and 7 where it would appear that the questioned ruling occurred during a continuous examination of the appellant, precluding him from giving a full explanation.

ARGUMENT.

The Court did not commit prejudicial error in its rulings or remarks in excluding certain testimony tendered by the Appellant. (Appellant's points I and II.)

A. The substance of the proffered testimony was shown to the court and no prejudice accrued to appellant by reason of his being precluded from going into details.

B. The rulings on the proposed evidence were proper.

C. The court's remarks relative to failure of recollection as a defense to perjury were not misunderstood and were harmless.

A. The Substance of the Proffered Testimony Was Shown to the Court and No Prejudice Accrued to Appellant by Reason of His Being Precluded From Going Into Details.

Appellant complains that after receiving an adverse ruling, as shown above in the statement of facts, that he was blocked from showing the admissibility of the evidence by an offer of proof.

Three aspects of the evidence intended to be introduced are clearly shown: First, that appellant had suffered from a mental illness in the past, second, that he was treated for this in the Marine Corps, third, that it has affected his powers of recollection or caused him failure of recollection. [R. 168-169.]

Certainly this is the overall substance of what was intended to be shown. Considered individually or collectively there is a sufficient offer for the court to rule and for this court to review. It has been said:

> ". . . But a formal offer of proof is not necessary where the record shows either from the form of

the question asked or otherwise what the substance of the proposed evidence is."

> *D' Aquino v. United States* (9th Cir., 1951), 192 F. 2d 338 at 374.

Furthermore, the court is fully justified in stopping counsel out of hand where an offer is being attempted in the presence of the jury.

> "The court very properly refused to permit appellant's attorney to state what he proposed to prove in the presence of the jury. Nor was it necessary to excuse the jury and delay the trial to permit the offer to be dictated to the reporter."
>
> *Shreve v. United States* (9th Cir., 1939), 103 F. 2d 796 at 806-807.

To the same effect see:

> *People v. Francis* (Calif. Dist. Ct. of Appeal), 319 P. 2d 103 at 107,

where it was held that it is not error to refuse an offer where no request is made to take such offer out of the hearing of the jury.

Counsel should have asked to approach the bench. He had been afforded this opportunity earlier in the trial. Furthermore, he was *cautioned at that earlier time not to state his offer in the presence of the jury*—a factor he completely ignored on the questioned occasion. [R. 107.]

It is apparent from the record that both prosecutor and court were attempting to prevent the offer occurring in the presence of the jury. [R. 169.]

B. The Rulings on the Proposed Evidence Were Proper.

A witness may not testify to his own mental illness or his own unsoundness of mind.

The leading case on this subject appears to be:

> *O'Connell v. Beecher* (App. Div. of Sup. Ct. of N. Y., 1897), 21 App. Div. 298, 47 N. Y. Supp. 334,

where it was said:

> ". . . Plaintiff was permitted to testify that . . . he fell from a building and was severely injured. This was competent. But he was further permitted to testify that for eight or nine years thereafter his mind was not right. . . . This was error. The witness was not an expert and was not competent to give an opinion upon this question."

The above case was cited with approval in a murder case, where it was said:

> "For obvious reasons under the circumstances of this case, the witness should not be permitted to testify to his own insanity, *or such acts from which insanity might be inferred.* It would open the door to a very wide field into which much fraud, dishonesty, and perjury may creep, *to say nothing of the ability of the witness to judge of the matter.*" (Italics added.)

> *Commonwealth v. Dale* (Sup. Ct. of Pennsylvania 1919), 107 Atl. 743.

In another murder case it was held:

> ". . . the defendant cannot be permitted to testify to his own mental unsoundness and the State's objection to this line of testimony was properly sustained."
>
> *George v. State* (Sup. Ct. of Alabama 1941), 200 So. 602 at 607.

In accord:

> *State v. Riggle* (Sup. Ct. of Wyo. 1956), 298 P. 2d 349 at 361.

The Federal rule is the same.

> *Piquett v. United States* (7th Cir., 1936), 81 F. 2d 75 at 81, cert. den. 298 U. S. 664.

Appellant cites three cases on this subject matter. None of the three hold that a witness or a defendant may testify as to his own unsoundness of mind.

In *State v. Coyne* (Missouri Sup. Ct. 1908), 214 Mo. 344, 114 S. W. 8, the court specifically pointed out that the proposed testimony was not offered from the defendant himself. In the case of *Leaptrot v. State* (Sup. Ct. of Florida 1906), 51 Fla. 57, 40 So. 616 at 617, appellant misquotes the case. It does not hold that the refusal of testimony on this subject was error. At page 618 the court states that the offer as to defendant's "change of mental condition" at time of false swearing and that defendant was not "strong or sound mentally" and was "not mentally responsible" was properly refused, because it was not "simply to show a failing condition of mind and memory upon the part of the defendant." (See p. 618 of 40 Southern Reports.) As to the admissible portion, it is to be noted that the defendant was not offered so to testify himself.

In *People v. Doody* (Court of Appeals of N. Y. 1902), 172 N. Y. 165, 64 N. E. 807 at 809-810 the court points out that experts testified. It is not shown whether the defendant did or did not.

Counsel for appellee have made a diligent search of all American cases and have not found any decision approving the defendant's being permitted to testify to his own "mental illness," mental unsoundness or mental disease, let alone a case where the refusal to take such testimony was held error.

Analyzing the proposed evidence, it becomes apparent that the ultimate purpose was to show that the residual effect of the "mental illness" was a poor memory, lack of memory or some similar defect. See comments of counsel to this effect on hearing for new trial set forth in the Appendix. Any other purposes would lack materiality.

It has been held that such causal connection between disease and defect is exclusively for expert opinion and that the jury should not be permitted to infer such connection without expert opinion on the subject.

> *Spivey v. Atteberry* (Sup. Ct. of Okla. 1951), 238 P. 2d 814.

And to evaluate symptoms and determine illness is for experts in this field of science.

> *Spivey v. Atteberry, supra;*
>
> *Wigmore on Evidence* 3rd Ed., Vol. VII, Section 1975, p. 118 *et seq.;*
>
> *Wigmore on Evidence,* 3rd Ed., Vol. II, Section 568, p. 660 *et seq.*

Nor can a lay witness, party to the suit or not, testify regarding the subject of his "treatment."

"Appellee testified that he was treated in the Veteran's Hospital for amebiasis. This was either hearsay or opinion testimony on a subject concerning which appellee was not qualified to express an opinion."

United States v. McCreary (9th Cir., 1939), 105 F. 2d 297 at 299.

Accord:

McConnell v. United States (3rd Cir., 1936), 81 F. 2d 639 at 640.

We do not wish to be misunderstood in the foregoing argument. Subject to certain tests and qualifications, lay witnesses may testify to external appearances or even as to how they "feel," etc.

Wigmore on Evidence, 3rd Ed., Vol. VII, Section 1974, p. 113 *et seq.*

But this clearly was not the purpose of the proposed testimony. Insofar as the appellant might have testified to poor memory or failure of recollection alone, not as a result of some disease, the evidence would probably be admissible.

No such question was put to the appellant on this subject during the incident under consideration.

Where admissible and inadmissible evidence are offered together the court may properly reject all.

Leaptrot v. State (Sup. Ct. of Fla. 1906), 40 So. 616 at 618;

McDuffie v. United States (5th Cir., 1915), 227 Fed. 961 at 965;

Huntington v. United States (8th Cir., 1909), 175 Fed. 950.

In any event, the appellant had testified at great length on the state of his recollection and poor memory at an earlier session of this trial. This testimony is set out at some length below, in the next subheading to this Argument.

As to this last aspect of the evidence proposed, the failing memory, even if this court concludes that such evidence was excluded on this occasion and it was error so to do, such error could not be prejudicial to the appellant in the light of his prior testimony on this point.

It is uniformly held that such an error, if error there be, is cured by admission of other evidence of the same facts.

> *Barshop v. United States* (5th Cir., 1951), 192 F. 2d 699 at 701;
>
> *Finn v. United States* (9th Cir. 1955), 219 F. 2d 894, 901;
>
> *Furlong v. United States* (8th Cir. 1926), 10 F. 2d 492, 494;
>
> *DeCamp v. United States* (D. C. Cir., 1926), 10 F. 2d 984, 985;
>
> *Strada v. United States* (9th Cir., 1922), 281 Fed. 143;
>
> Fed. Rules Crim. Proc. 52(a).

C. The Court's Remarks Relative to Failure of Recollection as a Defense to Perjury Were Not Misunderstood and Were Harmless.

Obviously the court did not mean its remarks [R. 169] to be taken as broadly as stated, nor is there any reason to suppose that at that time, in the trial, counsel for defense misconstrued what was said. This is shown by (1) the testimony theretofore taken, (2) the instructions given by

the court, and (3) the courts statements on the hearing of the motion for new trial.

In the first place a great deal of testimony had already been introduced on the defendants' recollections. The appellant himself had testified at great length about his inability to remember or accurately recall the beginning of intimacy with his wife. No attempt theretofore, by court or prosecutor, was made to inhibit or restrict the appellant's *own observations* of the state of his mind as it affected his ability to recollect events in their proper sequence. And the fullest opportunities were given to the appellant to give every reason or cause including poor memory that he might have had for having testified to matters which were in fact false.

Consider the following examples of questions, giving the widest latitude for explanation, put to the appellant while earlier on the stand and his answers as to his failure of recollection:

Direct examination:

> "Q. Now, why did you believe these statements to be true at the time that you made them? A. Because at the time that I made those statements I was under indictment, and I was to appear in court here on a previous trial, and I was trying to establish time; in other words, to find out when I had started living with my present wife, when our acquaintance began, where we had lived, when we became intimate, and several other different things.
>
> Q. Now, with whom did you discuss, if you discussed with anyone,—strike that.
>
> Did you talk to anybody at all in attempting to fix this time? A. Yes, I did. I talked to several people.

Q. Did you talk to me? A. Yes, I talked to you." [R. 143-144.]

* * * * * * * *

"Q. (By Mr. Cantillon): Whom, other than myself, did you speak to, if you spoke to anyone else, concerning fixing a time for your meeting and becoming intimate with your present wife? A. Well, I not only spoke to people,—I spoke to my wife, I spoke to my brother, I read documents there were presented to me in the form of indictments and pre-trial—I don't know the correct term for it—allegations, what the District Attorney was going to intend to prove, and different times and dates that he contended that I was somewhere, and we were in complete disagreement—my wife, and myself, and even my brother—so at your suggestion we hired—

The Court: Mrs. Edwards?

The Witness:—Mrs. Edwards to go out and try to establish the correct time that I had lived with my present wife on Lexington Avenue.

This she did, and came back and talked to me about it, and told me what Mr. and Mrs. Smith had told her.

From this, from talking to my wife, and from talking to my brother, from trying to put events in their proper places, and reading different material, this is how it came about.

Q. (By Mr. Cantillon): Whom did you talk to, other than your wife, and your brother, and Mrs. Edwards? Name the other people. A. Well, I talked to Leola Gerson, I talked to George Redman, I talked to Rudy, I talked to Paul Mandell—no, I take that back. Not at the time I never talked to

Paul Mandell, because he wasn't even here. I talked to another girl, Shirley Von Shenk, who was a waitress at the La Madelon.

I talked to several other bartenders who were at the La Madelon at the same time that I was. In other words, in my own mind I made a sincere effort to establish time and place.

I knew that I—the first place that I lived with my wife was the first time that I became real intimate with her." [R. 146-147.]

* * * * * * * *

"The Court: Did I understand you to say that you didn't remember that you had gas and lights in the place until the records were produced here?

The Witness: I honestly did not remember, your Honor, because I must have lived—I always lived in a furnished apartment. Generally the lights and the gas are provided and figure in the amount of the rent.

Well, since 1954 I venture to say I have lived in almost—especially the last year, because I have been traveling for this company, in over a hundred places. That is quite a lot of moves." [R. 148.]

* * * * * * * *

By Mr. Jensen:

"Q. Would you explain to me, Mr. Frisone, how you expected other people to recall when you became intimate with your wife, and couldn't remember your own intimacy with her as to the date? A. To the best of my knowledge,—you are asking me to recall, is that right?

Q. No, I am asking you why you thought other people would recall it better than you. A. Well, because I was not definite in my own mind.

Q. You were the man who was intimate with her, weren't you? A. I have been intimate with a lot of girls besides my wife, before I met her.

Q. Did you ever live with any of them for four months? A. Possibly longer.

Q. I take it, you felt satisfied when Mrs. Edwards told you that you could have lived with the Smiths in 1953, 1954 or 1955,—you felt satisfied on the basis of that information to come in here and testify that your intimacy did not commence with your wife until 1955? A. I wasn't satisfied.

Q. Why did you so testify, then? A. Well, because, due to the fact that the indictment which was handed me was marked in 1953 and 1954, which states these times.

I knew I hadn't been, to the best of my knowledge at the time of the trial, I hadn't been in Los Angeles in 1953. If I had, it had only been periodic, for a day or two in and out, or for a visit. I won't say for sure, and that is still a long time to be able to be positive.

In 1954 some time I started working at the La Madelon. Previous to working at the La Madelon, I believe I lived in San Bernardino or Las Vegas.

Now, when she mentioned winter, that was brought out by Mrs. Smith to me, there was only one winter which I was here, which could have been '54-'55. That along with my wife—talking to my wife, and talking to my brother, and talking to Mrs. Gerson, and talking to several other people is how I established those facts in my own mind, and up until those records were presented here, I firmly believed in my own mind that what I said was true at the trial,

and up until yesterday or the day before I still held it to be true. Since then I have found out I am in error.

Q. I take it, then, since yesterday or the day before, when the Government introduced that testimony, you couldn't of your own recollection recall within four months when you started living with your present wife? A. No." [R. 154-155.]

* * * * * * * *

"Recross Examination

"Q. (By Mr. Jensen): Mr. Frisone, how is it you can remember the details and the dates on the financial arrangements and the ownership of the La Madelon, and all the bartenders that were there, and you couldn't remember the date that you first started living with your wife? A. I didn't recall any specific dates of the financial arrangements.

Q. Didn't you state that the ownership transferred in August? A. I said it was sold a couple of times, I believe once in August, while I was work there, which was one period of time. I had been going with my wife for a long time before I even married her, which was an on and off romance.

Mr. Jensen: I have nothing further." [R. 160.]

The trial court recognized generally, that failure of recollection is a defense. In this respect, the appellate court's attention is invited to the instructions on this subject given by the court only a day later [R. 28-29], particularly the following:

"A false answer purposely made cannot be said to have been wilfully made if it was made by or through

surprise, mistake or inadvertence or if the false answers were made through forgetfulness or through a poor or mistaken recollection of facts." [R. 46.]

Surely, the court's remarks in question must be considered in the posture of the case at the time they were made and it should be kept in mind that the appellant had already testified in this case that *before his testimony in the prior trial* he recognized his own inability to recall the time sequence in question.

What the trial court had in mind in making this remark was: *A failure of recollection, recognized by a witness to exist at the time or before the false testimony is given is not a defense to a charge of perjury.*

Instructions to this effect were submitted by the Government and *served upon defense counsel* [R. 51, Requested Instruction 5] at the *begining of trial* [Rep. Tr. p. 11] and were later given to the jury. They are not questioned on this appeal and are the law of this case, clearly applicable to these facts. We quote the instruction given:

> "An unqualified statement of that which one does not know to be true, and of which he knows himself to be ignorant, is equivalent under the law of perjury to a statement of that which one knows to be false." [R. 45.]
>
> * * * * * * * *
>
> "A defendant charged with perjury, who during the course of the trial of another cause, affirmed the existence of a fact which he did not know to be true and about which he knew himself to be ignorant, is not guilty of perjury if an analysis of his entire testimony relative to such fact creates a reasonable doubt as to whether he intended to qualify his testi-

mony and convey, to those before whom his testimony was given, a belief that some uncertainty existed in his own mind relative to the truth of the fact affirmed." [R. 46.]

This rule in respect to perjury is incorporated in the statutes of California.

Section 125, Calif. Penal Code, enacted 1872.

It is proper for a court to give such instructions.

20 Cal. Jur., Section 7, at p. 1012;

People v. Von Tiedman (Sup. Ct. of Calif. 1898), 52 Pac. 155 at 158;

People v. Senegram (Cal. Dist. Ct. of Appeal 1915), 149 Pac. 786 at 787;

Cf. Butler v. McKey (9th Cir., 1943), 138 Fed. 373 at 377.

That the court understood the defense position to be that the appellant had no memory of the event but had made a good faith effort to determine the dates involved and was wrong as to his conclusion and testimony thereon is shown by his discussion with counsel at the hearing for new trial (see appendix) and the court correctly interpreted the situation when he commented to the effect that in this posture of events, evidence of the appellant's treatment is immaterial. We quote:

"Mr. Cantillon: Of course, he can testify that he suffered lapses of memory.

The Court: He explained it in another way. When a man defends it as correct, and only changes it when he is confronted with written testimony—well, any testimony that he was treated by the Marine Corps is not material." [Rep. Tr. p. 514.]

In any event, the extent to which a court's ruling is going to be applied to the introduction of evidence can only be determined by asking another question.

The plain fact of the matter at hand is that counsel never asked another question which pertained to the appellant's state of mind or the operation of his memory. What the court's ruling might have been as to such a question in this field is speculative except to the extent he had specifically accepted or rejected evidence on the subject before.

Further it is interesting to note that the appellant's counsel did not persist at all towards making a showing that *anything other than the appellant's treatment in the Marine Corps* was involved. Counsel had no such reluctance earlier in the trial about persuading the court to hear his position on admissibility of evidence. For an example of his extreme persistence, and success in the face of the court's initial adverse reaction, see R. 104-108.

This is doubly meaningful when it is borne in mind that this incident occurred on the recall of the appellant to the stand after extensive evidence had been taken from him, direct, cross, re-direct, and re-cross—all on the *reasons why the appellant had formerly testified as he had.*

Considering all of the foregoing, together with counsel's remark at the conclusion of the incident [R. 169], and the failure of the defense to come forward with a qualified medical witness or competent military or medical records as to the nature of appellant's treatment, one wonders if the "point made," to all present, was not the appellant's service in the Marine Corps.

The court's remarks in this respect at the Motion for New Trial are pertinent:

> "The Court: You didn't produce an expert to testify that he was suffering from a malady. All you were going to have him testify to was that he was treated by the Marine Corps." (See Appendix.)

We anticipate that counsel will contend that he need not fly in the face of such a statement by the court. This assumes, of course, that the court's remark was a clear cut ruling on the subject. In examining the language used it would appear to be in the nature of "thinking out loud." It is certainly equivocal and not by any means as incisive as rulings made on evidence at earlier points in the record. Compare the court's rulings in the record at pages 105-107 with the court's statement at R. 169.

We quote the latter:

> *"Well, I don't think* failure of recollection is a defense on a plea of not guilty in the Federal courts." (Emphasis added.)

The court's specific ruling in these premises was not and should not be construed to be anything more than a ruling that the appellant could not testify to his mental illness or to treatment received by him for mental illness while he was in the Marine Corps. And this, as we have shown before, was a proper ruling within the sound discretion of the court.

Conclusion.

Appellant cites *Crawford v. United States,* 212 U. S. 183 (1909), in his conclusion that he was prejudiced by the exclusions from the evidence. That case is an extremely harsh one, not on a par with case at hand, for there a defendant was precluded in all respects from answering evidence adduced by the prosecution. Furthermore, there, the tendered evidence was held clearly admissible.

Here all admissible evidence offered by the defense was received and many opportunities were given the appellant to testify further on the subject of his recollection or the operation of his memory.

The court's rulings were proper, his remarks were harmless and the appellant had the fullest opportunity to put forth his defense. The judgment should be affirmed.

Respectfully submitted,

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United States Attorney,

Robert John Jensen,
Assistant U. S. Attorney,
Chief, Criminal Division.

Attorneys for Appellee.

APPENDIX A

Hearing on Motion for New Trial.

(Reporter's Transcript, pages 513-515)

The Court: Gentlemen, I have read the affidavit and the memorandum which has just been filed, and if you want to add anything to it, Mr. Cantillon, you may.

Mr. Cantillon: Very well, your Honor. I am particularly directing the court's attention to the portions of the transcript which are recited in the memorandum.

The Court: Yes, I am familiar with them.

Mr. Cantillon: I think, your Honor, under the law, there is no question but that the evidence was relevant. The court would not permit me to make the offer of proof, although I did confine the—in an effort to make an offer of proof I did set forth the particular issues about which I did want to make the offer.

The Court: An offer of proof is only necessary if what you are trying to show is not evident. What you were trying to show by your questioning was that he was treated for a mental condition, which had nothing to do with perjury, and I knew what it was, so your offer of proof does not mean anything.

Mr. Cantillon: Your Honor, here is the one count upon which the man admitted falsehood. He stated that the falsehood was made by him as the result of having an honest failure of recollection.

He testified at some length as to how he attempted to refresh his recollection prior to the time he gave his prior testimony.

Now, to say a person's mental condition is not relevant on the subject of recollection is just not true.

The Court: You didn't produce an expert to testify that he was suffering from a malady. All you were going to have him testify to was that he was treated by the Marine Corps.

Mr. Cantillon: No, your Honor, that was not the extent of it. Your Honor interrupted me while I was in the process of making that statement, and said, "No, we don't want any offer."

The Court: You didn't bring in an expert to testify as to his condition. A man can't testify as to his mental condition.

Mr. Cantillon: Of course, he can testify that he suffered lapses of memory.

The Court: He explained it in another way. When a man defends it as correct, and only changes it when he is confronted with written testimony,—well, any testimony that he was treated by the Marine Corps is not material. I will stand by the ruling. You can go and try to get the Court of Appeals to overrule me. If that is all you have, I am ready to rule on the motion.

APPENDIX B.

The Indictment.

(In pertinent part)

Count Five
[U.S.C., Title 18, Sec. 1621]

I.

The grand jury incorporates by reference thereto and realleges as if set forth herein in full all the allegations in Paragraph I of Count One of this indictment and all the allegations in Paragraph II of Count Three of this indictment.

II.

And the grand jury further alleges that said defendant Anthony Frisone further testified at the time and place aforesaid, and under the circumstances aforesaid, as follows:

"Q. Let me ask you this: At the time that this took place in December of 1954, did you know your present wife, Nora, at that time?

A. I had met her. I had seen her. I think I had met her. I had seen her.

Q. In December of 1954?

A. Somewhere about that time.

Q. And you would say then that around the first of the year of 1955 your acquaintance with her was casual?

A. No. After the first of the year of 1955—I don't know what the—exactly the date, but we started going out together." [Reporter's transcript, page 138.]

* * * * * * * * *

"Q. In mid-December of 1954, did you know your present wife at that time?

A. I was acquainted with her. I had seen her.

Q. Had you ever dated her at that time?

A. No.

Q. Had she ever been in your automobile at that time?

A. I loaned my car out to several people while I was working. I couldn't say whether she had been or had not been. I don't know who took—

Q. Had she been in it while you were with her?

A. No, not while—" [Reporter's Transcript, page 140.]

III.

In truth and in fact, as the defendant Anthony Frisone well knew at the time of his so testifying, the said Anthony Frisone knew and was well acquainted with the defendant Nora Mathis Frisone in the summer of 1954, he having been frequently in her company during the summer of 1954 and during the said period they met and accompanied each other on social occasions; and that on or about September 17, 1954, said defendants Anthony Frisone and Nora Mathis Frisone lived together in Los Angeles, California, as man and wife, continuing to live thereafter in such relationship for the remainder of the year of 1954.